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Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 676

Case No. 736: AL-ATRAQCHI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, First Vice-President, presiding; Mr. Luis de Posadas Montero, Second Vice-President; Mr. Mikuin Leliel Balanda;

Whereas, on 28 June 1993, Mohammed Ali Al-Atraqchi, a staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"... to

1. Order the Secretary-General to submit to it and to the Applicant the replies on which [the Under-Secretary-General for Administration and Management] based his conclusion that 'the replies received did not provide basis for continuing the investigation and that he decided, accordingly, to close the matter.'

2. Find that these replies do not, as claimed by [the Under-Secretary-General for Administration and Management] provide a basis for discontinuing the first so called 'investigation'.

3. Order the Secretary-General to submit to it and to the Applicant a copy of the ... report in case this panel carried out the investigation it was instructed to carry out and in case it did not, give the reasons [why] this panel disobeyed [the Under-Secretary-General for Administration and Management]'s instructions.

4. Find that the JAB [Joint Appeals Board] panel constituted to investigate the present case failed to deal with the issues this appeal raised.

5. Find that the Secretary-General, for reasons of political expediency, never wanted the investigation to take place.

6. Find that the Staff Rules and equity demand that the investigation requested by both the JAB and UNAT be carried out by a joint administrative/staff body to ensure that due process and the staff member's rights be respected.

and, consequently, to

1. ... set up a joint staff/administrative body to seriously investigate the contentions made by the Applicant and several other staff members, as stated in Judgement No. 538;

2. ... award the Applicant two years net salary because of the foot-dragging and bad faith displayed by the Administration since August 1990, which already led to the loss of his second appeal before this Tribunal."

Whereas the Respondent filed his answer on 8 July 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 7 October 1967, on a probationary appointment at the P-2 level, as an Associate Statistician with the Statistical Office of the Department of Economic and Social Affairs. On 1 October 1969, his appointment was converted to a permanent one. On 1 June 1970, he was promoted to the P-3 level as a Statistician. On 1 September 1973, the Applicant was transferred to the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs (PSCA), as an Economic Affairs Officer. On 1 April 1974, he was promoted to the P-4 level and, on 1 July 1979, to the P-5 level as a Senior Political Affairs Officer.

In 1988, the Applicant applied, under the Vacancy Management System then in force, for the D-1 post of Chief, International Security and Regional Affairs Section, PSCA. He was short-listed together with five other candidates. Their names were transmitted by the Appointment and Promotion Board to the Department for final selection. On 3 April 1989, the Applicant was notified that he had not been selected for the post.

On 20 April 1989, the Applicant requested the Secretary-General to review the administrative decision not to select him for the post. On 27 February 1990, he lodged an appeal with the Joint Appeals Board (JAB). He claimed that the Vacancy Management System conflicted with the Staff Regulations and Rules and that the D-1 post for which he had applied had been earmarked for the successful candidate before the recruitment process had begun. In support of this contention, the Applicant submitted an affidavit, dated 23 August 1990, signed by nine staff members stating that the successful candidate for the post had been pre-selected.

In its report, adopted on 24 August 1990, the JAB recommended, inter alia, that an investigation be undertaken of the Applicant's claim that the post had been earmarked in advance for a particular candidate. In transmitting the JAB report to the Applicant, on 6 September 1990, the Under-Secretary-General for Administration and Management informed the Applicant of the Secretary-General's decision to take no further action on his appeal.

The Applicant filed an application with the Tribunal on 18 October 1990. The Tribunal rendered its Judgement No. 538, on 1 November 1991, upholding the Vacancy Management System but concurring with the JAB's concern regarding the claim set forth in the affidavit, dated 23 August 1990, as well as with the assertion that signatories thereto had subsequently been threatened. The Tribunal noted the absence of any inquiry by the Administration, endorsed the JAB's recommendation and expressed its trust that the

Administration would "conduct a full investigation with respect to this matter, including the alleged threat of retaliatory action." (Cf. Judgement No. 538, paragraph VI). In a letter dated 14 November 1991, the Applicant drew the Secretary-General's attention to this part of the Tribunal's judgement and asked that the investigation referred to be conducted as soon as possible.

In a letter dated 12 December 1991, to the Applicant and to the signatories of the affidavit of 23 August 1990, the Director, Office of the Under-Secretary-General for Administration and Management, asked what was the basis for the statement made in the affidavit that the post had been earmarked for a particular staff member. He inquired whether any retaliatory threats had been made in relation to the signing of the affidavit.

In a letter to the Director, Office of the Under-Secretary-General for Administration and Management, dated 1 January 1992, the Applicant challenged the approach of the Administration to the investigation, because the JAB, in its report, had called for a "special investigating body" to be established. The Applicant suggested that such a body should have staff participation. In his reply, dated 4 February 1992, the Director, Office of the Under-Secretary-General for Administration and Management, stated that "the conduct and modalities of an administrative investigation" were "within the discretion of the Secretary-General."

In a letter dated 19 February 1992, to the Director, Office of the Under-Secretary-General for Administration and Management, the Applicant accused the Administration of delaying the investigation to allow time for the Under-Secretary-General for Political and Security Council Affairs to leave the Organization and avoid being questioned on the matter. The Applicant urged that an appropriate investigative body be set up as soon as possible.

On 28 February 1992, the Director, Office of the Under-Secretary-General for Administration and Management, informed the Applicant that the replies he had received to the letter of inquiry

he sent to the signatories of the affidavit "do not provide a basis for continuing the investigation." He had decided, therefore, "to close the matter." On 25 March 1992, the Applicant requested the Secretary-General to review the decision not to carry out the investigation requested by the JAB and the Tribunal. On 25 May 1992, having received no reply, the Applicant lodged an appeal with the JAB.

In an undated letter, received by the Applicant in November 1992, the Principal Officer, Office of the Under-Secretary-General for Administration and Management, confirmed that the Secretary-General had decided, in the context of the pending JAB appeal, to "re-open the investigation into certain allegations made in a document dated 23 August 1990." She noted that a panel composed of two staff members had been appointed in June 1992 and that their investigation had been delayed due to their absences from the office, but said that they would "resume their work shortly."

In his letter dated 9 November 1990, to the Under-Secretary-General for Administration and Management, the Applicant expressed his objection to the composition of the panel and to the way it was conducting its investigation. He added that he would therefore "refuse to cooperate with this two person panel" and would "not accept its conclusions."

In a letter dated 23 November 1992, the Under-Secretary-General for Administration and Management stated that the Secretary-General "has full discretion as to the manner in which investigations are conducted on his behalf," and urged the Applicant "to reconsider [his] decision not to cooperate with the panel which has been appointed." He noted that he was in any event "instructing the panel to proceed with its investigation forthwith."

On 2 March 1993, the JAB adopted its report. Its considerations and recommendations read, in part, as follows:

> "22. The Panel noted that the Appellant's main objection was to the composition of the Investigation Panel, ...

23. The Panel felt that since the Secretary-General had carried out an investigation as expected by the Tribunal, the issue in question was the interpretation of the Tribunal's concept, if any, of how the investigatory body should be composed. As the judgement was silent on that point, the Panel decided that no one could interpret the Tribunal's decision but the Tribunal itself.

24. The Panel regretted that such a long time had elapsed before the Secretary-General had appointed an investigation panel and that he had done so only after the Appellant had requested an administrative review of his failure to do so.

25. The Panel recommends that the appeal be rejected."

On 5 April 1993, the Under-Secretary-General for Administration and Management transmitted the JAB report to the Applicant and informed him, inter alia, as follows:

"The Secretary-General has re-examined your appeal in the light of the Board's report and he accepted the Board's recommendation. No further action will be taken on your appeal.

With regard to the observations in paragraph 24 of the Board's report, the Secretary-General wishes to recall that circumstances beyond the control of the panel members delayed the investigation. Progress in the investigation was further hampered because of your unwillingness to cooperate with the Panel."

On 28 June 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The JAB did not carry out its task, and instead of dealing with the issues raised by the case, referred them to the Tribunal.

2. The Administration did not want a full and fair investigation to take place.

3. The Staff Rules and Regulations and equity demand that the investigation be carried out by a joint body including staff representation.

Whereas the Respondent's principal contention is:

The Secretary-General may investigate allegations of improper conduct without submission of such matters to joint bodies. The Applicant must cooperate with such investigation and bears the risk of his non-cooperation.

The Tribunal, having deliberated from 20 October to 4 November 1994, now pronounces the following judgement:

I. The Joint Appeals Board (JAB) considered the Applicant's appeal against the decision not to promote him to the D-1 post of Chief, International Security and Regional Affairs. After the JAB had completed its consideration of the case, the Applicant submitted an affidavit dated 23 August 1990, signed by a number of staff members, who asserted that the contested post had been earmarked "a priori" for a particular candidate. The JAB took note of the affidavit and "in view of the seriousness of the charge and the fact that it [was] not competent to conduct inquiries which might involve disciplinary sanctions" transmitted the affidavit to the Secretary-General "with the recommendation that he establishes a special investigating body".

II. At the time, the Secretary-General did not follow this recommendation. As a consequence, the Applicant appealed to the Tribunal. In its Judgement No. 538, the Tribunal included a paragraph in which it noted "with dismay the apparent absence, on the part of the Administration, of any inquiry of the staff members

involved with respect to either the perception or the alleged threat described by them to determine and evaluate their basis, ...". In addition, the Tribunal trusted that "the Respondent [would] (a) act on the recommendation made by the Joint Appeals Board ..., (b) conduct a full investigation with respect to this matter" and finally concluded that "the inadequate action with respect to the concerns expressed by the Joint Appeals Board regarding the document dated 23 August 1990, in itself, constituted unfair treatment of the Applicant" and called for compensation.

III. Pursuant to Judgement No. 538, the Director of the Office of the Under-Secretary-General for Administration and Management, on 12 December 1991, sent letters to the staff members whose signatures appeared in the affidavit, inquiring as to "(a) the basis on which you made the statement contained in the above-mentioned affidavit; and, (b) whether you received any threat in relation to the signing of the affidavit; if so, when, by whom, and in what terms." This was the only step taken to comply with the JAB's recommendation and the Tribunal's request. The Acting Under-Secretary-General for Administration and Management informed the Applicant on 28 February 1992, that "the replies received to the letter sent to the signatories of the affidavit dated 23 August 1990 do not provide a basis for continuing the investigation and [that he had] decided, ..., to close the matter."

IV. The Applicant challenged this decision, alleging that no serious investigation in the sense requested by the JAB and the Tribunal had taken place. While the JAB was considering the case, the Respondent, on 5 August 1992, informed the JAB that the "new Under-Secretary-General for Administration and Management had decided that a full-fledged investigation of the allegations made by [the Applicant] would be conducted ..." He added that "an

investigation panel has been appointed." In view of these circumstances, the Respondent argued that "the appeal involved in [the Applicant's] case ... is now without any object."

This letter, which was treated as the Respondent's reply to the Applicant's statement of appeal, was transmitted to the Applicant on 2 October 1992. He made no comments on the Respondent's submission that the case was moot. The JAB was equally silent on this issue. The Tribunal, in this respect, shares the Respondent's view and considers that the proceedings should have ended at this stage.

V. Nevertheless, this did not occur. As set forth below, the following new developments ensued having the same effect as a new recourse procedure. The Applicant, upon being informed that the Administration had set up a new investigation panel, challenged this decision on 9 November 1992, on the ground that he should have been notified in time of the appointment of the new panel and consulted about its composition. He also claimed that the panel should have been constituted pursuant to administrative instruction ST/AI/371. He objected to the secretive way in which the panel conducted its work. The Applicant also informed the Administration that he would not cooperate with the new panel.

In his reply dated 23 November 1992, the Under-Secretary-General for Administration and Management stated that "the Secretary-General has full discretion as to the manner in which investigations are conducted on his behalf. He may appoint anyone he deems to be qualified to conduct the investigation provided that, as is the case here, the appointed officials have been selected with a view to ensuring fairness and impartiality. It is the Secretary-General's responsibility to ensure that facts are properly ascertained, and in discharging that responsibility, there is no need to consult any individual staff member or the staff representative bodies."

The JAB took note of the Applicant's objections and was of the view that "the issue in question was the interpretation of the Tribunal's concept, if any, of how the investigating body should be composed" and, that, therefore "no one could interpret the Tribunal's decision but the Tribunal itself."

The JAB recommended that the appeal be rejected. The Tribunal considers that the JAB's recommendation refers both to the appeal lodged by the Applicant against the decision to close the original investigation and to the appeal against the establishment of the new investigation panel. The Secretary-General accepted the JAB's recommendation and the Applicant appealed before the Tribunal.

VI. The Tribunal, having examined the different pleas submitted by the Applicant, finds:

(a) With respect to the pleas in which the Applicant challenges the decision taken by the Administration to close the first investigation, the Tribunal is of the view that, inasmuch as a new investigation was ordered, the challenged decision is irrelevant and the issue is to be considered moot.

(b) In connection with the plea that the Applicant should be provided with a copy of the report produced by the second investigation panel, the Tribunal trusts that the Applicant would have been provided with a copy of the report once the investigation had been completed. Nevertheless, in view of the Applicant's decision not to cooperate, the Tribunal recalls its Judgement No. 560, Claxton (1993), paragraph VIII in which it held that "the staff member making the allegations must, of course, participate, without obstructing, in such investigations or possibly be subject to loss of the right to remedial action." Cf. also Judgement No. 659, Al-Atraqchi (1994), paragraph V.

(c) As regards the plea asserting that the JAB "failed to deal with the issues this appeal raised", the Tribunal is unable to share the Applicant's views. As shown in its report, the JAB duly

considered the different points raised by the Applicant and concluded that the appeal should be rejected on the ground that it was exclusively up to the Tribunal to decide whether the investigation panel set up by the Administration complied with the request in Judgement No. 538.

The JAB's report shows that, when it reached its conclusions, it was fully cognizant of the objections raised by the Applicant to the decision to establish the new investigation panel.

The Tribunal therefore finds no merit in the Applicant's plea in this respect.

(d) As to the assertion that the "Secretary-General, for reasons of political expediency, never wanted the investigation to take place", the Tribunal holds that the fact that a second investigation was decided upon after the first one was closed is sufficient to show that there were efforts on the part of the Administration to act on the Applicant's recourse. Had the Applicant cooperated and permitted the investigation to be completed, he could have appealed against any administrative decision based on it.

(e) In his last plea, the Applicant requests the Tribunal to find that "the Staff Rules and equity demand that the investigation requested by both the JAB and UNAT be carried out by a joint administrative/staff body." The Tribunal holds that the Administration has not contravened any existing rule or regulation in establishing the investigation panel which is being challenged.

VII. The Applicant claims that the procedure to be followed should be the one set forth in administrative instruction ST/AI/371.

The Tribunal observes that there has been no departure from such a procedure and that the steps taken in connection with the Applicant's recourse complied with the provisions of Chapter II of administrative instruction ST/AI/371. Those provisions do not contemplate, in the preliminary phase of fact finding, the setting up of a joint staff/administrative body, as requested by the Applicant.

Furthermore, the Administration, in its letter dated 23 November 1992, clearly stated that it intended to adhere to ST/AI/371.

VIII. The Tribunal therefore finds that the investigation called for in Judgement No. 538 was duly established by the Administration, and that, in view of the Applicant's refusal to participate, no further action with respect to the matter need be taken by the Respondent.

For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
First Vice-President, presiding

Luis de POSADAS MONTERO
Second Vice-President

Mikuin Leliel BALANDA
Member

New York, 4 November 1994

B. Maria VICIEN-MILBURN
Executive Secretary